In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78 - 179

ROBERT L. JOHNSON, JR., ET AL.,
Petitioners

versus

RYDER TRUCK LINES, INC., ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT RYDER TRUCK LINES, INC., IN OPPOSITION

E. Osborne Ayscue, Jr.,
HELMS, MULLIS & JOHNSTON
2800 NCNB Plaza
Charlotte, North Carolina 28280

Attorneys for Respondent Ryder Truck Lines, Inc.

J. P. Jones
Peter Reed Corbin
JONES, CORBIN & DICKINSON
Post Office Box 41566
Jacksonville, Florida 32203

Attorneys for Respondent Ryder Truck Lines, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-179

ROBERT L. JOHNSON, JR., et al.,
Petitioners

versus

RYDER TRUCK LINES, INC., et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT
RYDER TRUCK LINES, INC.
IN OPPOSITION

COMES NOW the Respondent, Ryder Truck Lines, Inc., by and through its undersigned attorneys, and respectfully prays that the Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit filed in this proceeding on July 31, 1978, be denied.

JURISDICTION

Respondent Ryder does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondent Ryder contends that the questions presented in this case are more appropriately stated as follows:

1. Does a facially neutral seniority system which has been found to perpetuate the effects of past discrimination violate 42 U.S.C. § 1981 when the seniority system is bona fide under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h)?

2. Does 42 U.S.C. § 1988 mandate that 42 U.S.C. § 1981 be interpreted consistent with the substantive provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and particularly Section 703(h) of that Act?

3. Did Congress by the enactment of Section 703(h) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-(h), partially and impliedly repeal 42 U.S.C. §1981?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition, 42 U.S.C. § 1988 provides in pertinent part:

> "The jurisdiction in civil...matters conferred on the district courts by the provisions of this chapter...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect...."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct. However, the Petition misstates the precise reasons supporting the decision reached by the Fourth Circuit panel on rehearing.

The two members of the Court of Appeals who formed the majority opinion did not conclude that the seniority system in this case would have violated 42 U.S.C. § 1981 prior to the decision by this Court in *Teamsters v. United States*, 431 U.S. 324 (1977). Nor did the panel conclude that Section 703(h) of Title VII, as construed by *Teamsters*, is directly applicable to § 1981. What the panel majority did decide is that *Teamsters* invalidated the earlier conclusion that Ryder's facially neutral seniority system violated Title VII since the seniority system involved in this case was "virtually identical" to that considered in *Teamsters*. App. 2a-3a. Completely independent of this conclusion, however, the panel majority also concluded that the neutral senority system, which applied alike to "both white and black employees", did not violate § 1981.[1] The panel majority went on to conclude that a contrary holding would "disregard the precepts of § 1988" which directs the federal courts to enforce § 1981 "in conformity with the laws of the United States." App. 5a. In a special concurring opinion, the third member of the court's panel agreed with the majority's conclusions in all respects, with the exception of that concerning § 1988, which he felt had "nothing to do with this case." App. 10a.

---

1. All three members of the panel agreed that the only cause of action under § 1981 of the pre-1965 incumbent black employees was when they were initially hired, but that this cause of action was barred by North Carolina's three year statute of limitations, N.C. Gen. Stat. § 1-52(1).

ARGUMENT

Setting the legal intricacies aside, this case boils down to whether this Court is willing to render meaningless and completely undermine its recent landmark decision in *Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977) by opening to attack under 42 U.S.C. §1981 seniority systems which are both facially neutral and "bona fide" within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), even though the seniority systems may perpetuate the effects of past discrimination. The Petition presents three basic arguments why it should be granted: (1) the Fourth Circuit's decision below is inconsistent with this Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 10 FEP Cases 817 (1975); (2) there is a split among the circuits over the application of 42 U.S.C. §1981 to facially neutral seniority systems that perpetuate past discrimination; and (3) this Court has already granted certiorari in *County of Los Angeles v. Davis*, No. 77-1553, which presents an issue similar to that in the instant case.

Perhaps the Petitioners' weakest argument is the contention that the Fourth Circuit's Decision below is inconsistent with this Court's Decision in *Johnson v. Railway Express Agency, Inc., supra*, where, in the midst of holding that the timely filing of a charge with the EEOC under Title VII does not toll the running of the applicable statute of limitations in § 1981 claims, this Court also found that the "remedies available" under the two statutes "although related, and although directed to most of the same ends, are separate, distinct and independent." 421 U.S. at 461, 10 FEP Cases at 820. Respondent Ryder does not dispute this basic proposition. However, as has been recognized by a number of courts, the obvious flaw in the Petitioners' theory is that it would result in a clearly undesirable conflict in an extremely important area of *substantive* federal law. It is for this very reason that the great weight of authority (and the better-reasoned approach), both before and after *Johnson* and *Teamsters*, has recognized that the two avenues of relief, although separate and independent, are nonetheless parallel and overlapping, and should be interpreted in such a manner as to avoid inconsistent results in their substantive provisions. See *Davis v. County of Los Angeles*, 566 F.2d 1334, 16 FEP Cases 396, 400-01 (9th Cir. 1977), *cert. granted*, No. 77-1553 (1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270, 12 FEP Cases 314, 323 (4th Cir.), *cert. denied*, 429 U.S. 920, 13 FEP Cases 1808 (1976); *Chance v. Board of Examiners*, 534 F.2d 993, 11 FEP Cases 1450 (2d Cir.), *modified on rehearing on other grounds*, 534 F.2d 1007, 13 FEP Cases 150 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, 14 FEP Cases 1822 (1977); and *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 8 FEP Cases 577 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 12 FEP Cases 1335 (1976). The court below quite correctly pointed out that *Johnson* gives "no indication . . .that Congress intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination." App. 6a-7a. Indeed, this Court recognized the "parallel" and "overlapping" relationship between Title VII and §1981 in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, n. 7, 7 FEP Cases 81, 85 (1973). Any other conclusion than that reached below would not only render meaningless Section 703(h) of Title VII, but would also completely undermine this Court's Decision in *Teamsters*.

Although Ryder agrees that the position among the circuits concerning the application of § 1981 is not uniform, the Petition considerably overstates the alleged conflict among the circuits on this issue. Initially, it should be pointed out that no circuit, including the Second Circuit, has squarely held that the enactment of Section 703(h) constituted a partial "repeal by implication" of § 1981. Indeed, those circuits which have squarely ruled upon this question, including the Fourth Circuit below, have unanimously held that Section 703(h) did not impliedly repeal § 1981. App. 3a, 9a, n.2; see *Bolden v. Pennsylvania State Police*, ___F.2d___, 17 FEP Cases 687 (3d Cir. 1978); and *Long v. Ford Motor Co.*, 496 F.2d 500, 7 FEP Cases 1053 (6th Cir. 1974). A rejection of the implied appeal theory is, in essence, all the Third Circuit was saying when, in *Bolden v. Pennsylvania State Police, supra*, it commented in general fashion that Congress, by enacting Title VII, did not intend to "circumscribe the remedial powers of the federal courts under §§ 1981, 1983, 1985 and 1988." —— F.2d at ——, 17 FEP Cases at 693. Neither has the Second Circuit expressly adopted the implied repeal theory. In *Chance v. Board of Examiners, supra*, the court concluded that a neutral seniority system which "passed scrutiny under the substantive requirements of Title VII", also was not violative of § 1981 (citing the Sixth Circuit's decision in *Waters v. Wisconsin Steel Works, supra*). 534 F.2d at 998, 11 FEP Cases at 1454. The court stated that its conclusion was the same whether Section 703(h) of Title VII was "considered a repeal by implication of any possible contrary construction in § 1981, or *simply a statement of guiding legal principles. . .*" *id.* (Emphasis added).

No circuit has interpreted § 1981 in the manner advocated

by the Petitioners here. Specifically, the Second, Fourth Seventh and Ninth Circuits, in the cases cited above, all have specifically interpreted § 1981 so as to avoid undesirable conflicts in the substantive provisions of Title VII. The Third, Fifth,[2] Eighth and Tenth and D.C. Circuits have not ruled on the specific issue presented here, and the Sixth Circuit has not faced the issue since *Teamsters*. The Sixth Circuit's decision in *Afro-American Patrolmen's League v. Duck*, 503 F.2d 294, 8 FEP Cases 1124 (6th Cir. 1974), and the Fourth Circuit's decision in *Williams v. Norfolk and Western Ry.*, 530 F.2d 539, 11 FEP Cases 836 (4th Cir. 1975) do not support the Petitioners' position. Both of these decisions were handed down before *Teamsters*, and both applied § 1981 in a manner which was consistent with the way most courts had interpreted Title VII up to that time.

Respondent Ryder agrees that the issue in this case bears a close relationship to that which this Court will decide in *County of Los Angeles v. Davis*, No. 77-1553. However, it is also entirely possible that the decision in *County of Los Angeles* would dispose of this case. Whether this Court af-

---

2. In *Watkins v. United Steel Workers, Local 2369*, 516 F.2d 41, 10 FEP Cases 1297 (5th Cir. 1975), the Fifth Circuit upheld a facially neutral seniority system under both Title VII and § 1981. In reaching its decision, the court expressly refrained from ruling on whether Section 703(h) impliedly repealed § 1981. As the Petition pointed out, p. 9,n. 12, the court was no doubt influenced at least in part by the finding that the seniority system in question did not perpetuate the effects of past discrimination. It is significant to note, however, that in reaching its decision, the court interpreted Title VII and § 1981 in parallel and consistent fashion. Moreover, the court gave an indication that it, like the Second, Fourth, Seventh and Ninth Circuits, would interpret § 1981 so as to avoid substantive conflicts with Title VII, when it decided in *United States v. East Texas Motor Freight*, 564 F.2d 179, 16 FEP Cases 163 (5th Cir. 1977) that a seniority system "bona fide" under Title VII was not unlawful under Executive Order 11246.

firms the Ninth Circuit's decision (and its holding that there is "no operational distinction. . .between liability based upon Title VII and § 1981", 566 F.2d at 1340, 16 FEP Cases at 401), or reverses its decision and accepts the view that §1981 requires a showing of discriminatory intent,[3] in either case there would be no basis for reversing the Fourth Circuit's well-reasoned opinion below.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully reuested that the Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit be denied.

Respectfully submitted,

J.P. Jones
Peter Reed Corbin
JONES, CORBIN & DICKINSON
Post Office Box 41566
Jacksonville, Florida 32203

E. Osborne Ayscue, Jr.,
HELMS, MULLIS & JOHNSTON
2800 NCNB Plaza
Charlotte, North Carolina 28280

Attorneys for Respondent, Ryder Truck Lines, Inc.

3. See *Washington v. Davis*, 426 U.S. 229, 12 FEP Cases 1415 (1976); *Davis v. County of Los Angeles, supra*, (Dissent of Judge Wallace); *Johnson v. Hoffman*, 424 F.Supp. 490, 16 FEP Cases 371 (E.D. Mo. 1977); and *Croker v. Boeing Co.*, 437 F.Supp. 1138, 15 FEP Cases 165 (E.D. Pa. 1977).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Brief For Respondent Ryder Truck Lines, Inc., In Opposition has been served this 24th day of August, 1978, by United States first class mail, upon the following:

Jack Greenberg, Esquire
Eric Schnapper, Esquire
Suite 2030
10 Columbus Circle
New York, New york 10019

Jonathan Wallas, Esquire
Louis L. Lesesne, Jr., Esquire
J. LeVonne Chambers, Esquire
Chambers, Stein, Ferguson & Becton
951 South Independence Boulevard
Charlotte, North Carolina 28202

Barry L. Goldstein, Esquire
806 15th Street, Northwest
Suite 940
Washington, D.C. 20006

Roland P. Wilder, Jr., Esquire
25 Louisiana Avenue, Northwest
Washington, D.C. 20001

10

Francis M. Fletcher, Jr., Esquire
Harkey, Faggart, Coire & Fletcher
Nineteenth Floor, Wachovia Center
Charlotte, North Carolina 28285

_____
Attorney